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IN THE

Supreme Court of the United States

October Term, 1991

CALVIN BURNEY AND MITCHELL BURNEY,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

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To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

STATEMENT OF THE CASE

Calvin Burney and Mitchell Burney, the petitioners herein, were indicted by the Grand Jury of Cuyahoga County, Ohio, on December 28, 1987. The case was given the number CR 222830. The events which resulted in the indictment occurred on November 6 and 13, 1987. Both petitioners signed a speedy trial waiver in CR 222830.

On April 17, 1989, the same Grand Jury returned a second indictment which named both of the petitioners. The case was given the number CR 238069. The second indictment was also based on events which occurred on November 6 and 13, 1987.

A jury trial was commenced on August 14, 1989 in CR 238069. On August 25, 1989, both petitioners were found guilty on eight (8) counts of the indictment. On October 2, 1989, the indictment in CR 222830 was dismissed as the result of a *nolle prosequi.*

Both petitioners appealed their convictions to the Court of Appeals of Ohio, Eighth District. On June 6, 1991, the appeals court announced its Journal Entry and Opinion wherein it affirmed the convictions of Calvin Burney. On August 1, 1991, the appeals court announced its Journal Entry and Opinion wherein it affirmed the convictions of Mitchell Burney. Petitioner Calvin Burney's motion for leave to appeal to the Supreme Court of Ohio was overruled on November 13, 1991. Petitioner Mitchell Burney's motion for leave to appeal to the Supreme Court of Ohio was overruled on December 18, 1991.

STATEMENT OF THE FACTS

In October of 1987, Special Agent Ron Carter of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms (ATF), was assigned to participate in a joint task force operation in the greater Cleveland area between ATF agents and the Cleveland Police Department Narcotics Unit.

The purpose of the operation was to develop and pursue information of narcotics and firearms offenses. Agent Carter learned of a person named "Billy" dealing cocaine and marijuana in Cleveland. The task force personnel decided to pursue a deal with "Billy" and Agent Carter was to arrange the purchase of one ounce of cocaine from "Billy" with Cleveland police buy money.

The plan was to allow the purchase of the one ounce of cocaine to go through without an arrest in order to facilitate the investigation. The purchase was set for the 6th of November, 1987, with surveillance teams monitoring the body wire worn by Carter.

At 2:30 p.m. on November 6, 1987, Carter drove to 3340 East 113th Street in Cleveland, Ohio, and met with "Billy," who was William Atkinson. Atkinson gave Carter instructions to drive to a location without giving him the destination. They arrived at the intersection of Delmont and Euclid and waited in the parking lot of a Kentucky Fried Chicken franchise. Carter had $1,500 in Cleveland police buy money with him for the one ounce purchase. After a ten minute wait, a white BMW with two occupants drove past and stopped in front of Carter's vehicle. Atkinson indicated that Carter was to follow and park near the BMW on the street.

Carter identified Calvin Burney as the driver of the white BMW and Mitchell Burney as the front seat passenger. Atkinson left Carter's vehicle with the $1,500 and went to the BMW and returned with the ounce of cocaine. Carter was able to read the license plate on the BMW as 418 HFT, and recited it aloud for the body wire monitor while Atkinson was out of the vehicle. Carter testified he clearly saw Calvin Burney as the driver twice, once during the drive-by and once during the transaction on the street. When Atkinson returned with the cocaine, Carter examined it and Atkinson then waved off the Burneys and they left.

On November 9, 1987, Carter went to the Cleveland Police Department and identified Calvin and Mitchell Burney from photographs as the occupants of the BMW. At this time, it was decided to place another order with Atkinson for four ounces of cocaine and to arrest the petitioners and Atkinson during the transactions. The plan was to conduct surveillance of the petitioners and to stop them either prior to their arrival at Atkinson's residence or the street location if the deal did not happen at Atkinson's residence.

On November 13, 1987, at 11:00 a.m., wearing the body wire, Carter again went to Atkinson's residence at 3340 East 113th Street. Carter had prearranged the price with Atkinson at $1,200 per ounce for a total purchase of $4,800 for four ounces. Upon Carter's arrival, Atkinson pulled Carter aside and told him, "... he had good news and bad news for me. He stated the bad news that there was only going to be three ounces of cocaine, instead of four, because his sources didn't have time to go to the stash house. He stated that the good news was that it would still be $1,200 an ounce, that we wouldn't have to go anywhere, that the transaction would take place there."

They went to the dining room and Atkinson counted the buy money Carter had brought with him. During this time conversation ensued in which Carter asked Atkinson if Carter could purchase more than four ounces at a time at a later date. Atkinson said that he could.

Atkinson began to get impatient and began making phone calls to attempt to hurry up the delivery. Atkinson stated to Carter and Carter observed that Atkinson was calling a paging company to page his suppliers.

Carter waited for one and one-half hours and was paged by his office and told to leave Atkinson's residence. As he was leaving, the police units converged on the residence and arrested Atkinson, Carter and Carter's informant.

Just prior to these events, the white BMW, bearing Ohio license plate 418 HFT, containing the petitioners, was being observed by the other members of the task force, including Detective Daniel Zaller of the Cleveland Police Department Narcotics Unit.

At approximately 1:30 p.m. on the 13th, the BMW was stopped by the task force at 116th Street and Melba, three blocks from Atkinson's residence on 113th Street. Two police vehicles converged on the BMW from the front, one from the rear, and another was alongside the BMW. The officers identified themselves. At trial, Calvin Burney agreed that some of the officers were wearing badges which were visible and all of the officers had weapons drawn. Mitchell Burney testified that he saw a police car in front of the BMW and guns everywhere.

As the police teams blocked the progress of the BMW, Calvin Burney, who was driving, attempted to back the BMW out of the blockade and had to be

ordered to stop. The petitioners were seen to be moving around inside the BMW in what Detective Zaller termed a "commotion." Zaller exited his vehicle and approached while the petitioners were being removed from the BMW by other officers.

At his arrival at the BMW, Zaller observed a gun between the front seats. Zaller then handcuffed and searched Mitchell Burney, finding three ounces of cocaine in his jacket. Zaller checked the gun, a nine millimeter Browning automatic pistol, and found it to be loaded with a round in the chamber. Zaller had the pistol tested prior to trial by the Cleveland Police Department Scientific Investigation Unit and it was fired in his presence.

Detective Zaller found a Mobilcom pager on Calvin Burney at the scene. The pager had a liquid crystal display and a memory function to display numbers of persons calling the pager. At the time the pager was removed from the person of Calvin Burney, it had William Atkinson's phone number stored as the most recent caller.

A trial on charges resulting from the arrests commenced on August 14, 1989. The petitioners were originally indicted on December 28, 1987 (Case No. CR 222380). They were reindicted on April 17, 1989 (Case No. CR 238069). The trial judge ruled that all prior rulings in CR 222380 would apply in CR 238069. Petitioners each signed a speedy trial waiver on July 6, 1988.

Petitioners filed a Motion to Suppress Evidence on August 10, 1988. Petitioners requested a trial continuance on March 29, 1989. On May 4, 1989, petitioners filed a Motion to Dismiss CR 238069 for lack of a speedy trial, pursuant to O.R.C. 2945.71.

SUMMARY OF ARGUMENT

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioners guilty. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioners' appeal for the reason that no substantial constitutional question existed.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court, the Supreme Court of the United States. There is, therefore, no substantial federal question presented by the petition for certiorari.

REASONS FOR DENYING THE WRIT

1. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

The petitioners have presented a total of four questions for review in their Petition for a Writ of Certiorari.

In the first and second questions for review, the petitioners allege a denial of "due process," but fail to follow through with any discernible argument which would support such a claim. The petitioners' first two arguments, in summary, are as follows: (1) petitioners filed a Motion to Dismiss Case No. CR 238069 on the basis of the State of Ohio's speedy trial statutes (O.R.C. 2945.71-.73); (2) the trial court denied the motion; (3) Findings of Fact and Conclusions of Law were not issued; (4) the petitioners filed separate appeals alleging that the denial of the speedy trial motion was erroneous because the speedy trial waiver they signed in Case No. CR 222830 did not, or should not, apply to Case No. CR 238069; (5) the appellate court, in two separate opinions, agreed that the speedy trial waiver in CR 222830 could not be applied to CR 238069; (6) the appellate court, however, held that regardless of whether the speedy trial waiver was applicable, the petitioners had been brought to trial within the time limits of the Ohio Revised Code; and (7) it was a denial of due process for the appellate court to base its opinion on the Ohio Revised Code where neither the petitioners nor the prosecution raised the issue of compliance with the statute on appeal.

Petitioners make no allegation that they were denied a speedy trial as mandated by the United States Constitution or the Constitution of the State of Ohio. Instead, they challenge the lawfulness of the appellate court's application of O.R.C. Sections 2945.71, 2945.72 and 2945.73. They do not challenge the aforementioned code sections' constitutionality, only the propriety of the application thereof by the appellate court.

O.R.C. 2945.71 mandates that any person against whom a charge of felony is pending "shall be brought to trial within two hundred seventy days after his arrest." In the pending case, the petitioners, along with a third co-defendant, filed a joint motion to dismiss CR 238069 which was based solely on a denial of speedy trial pursuant to O.R.C. 2945.71-O.R.C. 2945.73. Prior to trial the judge heard arguments on behalf of both the State and the petitioners with regard to the speedy trial issue. The judge denied the motion and did not issue any Findings of Fact or Conclusions of Law. Counsel for petitioners made no request for Findings or Conclusions.

Despite the fact that the trial judge never made a specific ruling as to whether the speedy trial waiver in the first case applied in the second case, the petitioners appealed alleging that if he had ruled that way his judgment would have been erroneous.

The appellate court, while accepting the argument of the petitioners as a truism, held the application of the speedy trial waiver to be irrelevant to resolution of the ultimate issue of compliance with the speedy trial statute. Instead, the appellate court held that the petitioners had, in fact, been brought to trial within the time limits as set out in the Ohio Revised Code. Code Section 2945.72 provides for an extension of the statutory speedy trial time for "[a]ny period of delay

necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused" and "[a]ny period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." With regard to speedy trial statutes, this Court has held: "The States, of course, are free to prescribe a reasonable period consistent with constitutional standards . . ." *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). The Supreme Court of Ohio has found Ohio's statutory speedy trial guidelines to "represent a rational effort to enforce the constitutional guarantee of a speedy trial." *State v. Pachay*, 64 Ohio St. 2d 218, 416 N.E. 2d 589 (1980). In the pending case, the appellate court found that various continuances and delays which resulted from the actions of the accused extended the statutory speedy trial limits pursuant to O.R.C. 2945.72. Each and every action of the petitioners, which caused the extensions of time, was a matter of record.

In summary, the petitioners filed a trial motion to dismiss their case on the basis of O.R.C. 2945.71-2945.73. The trial court denied the motion. The petitioners appealed the denial of the motion. The Court of Appeals affirmed the judgment of the trial court and held that the petitioners had, in fact, been brought to trial within the time limits of O.R.C. 2945.71-2945.73. The holding of the appellate court involved no federal question. The petitioners' first and second arguments in support of their Petition for a Writ of Certiorari raise no federal question. There is no special and important reason for granting the writ based on the arguments of the petitioners.

In their third argument, as in the first two, the petitioners again fail to present the Court with a question of federal law. In summary, the petitioners are arguing that a trial court has a duty to give an affirmative defense jury instruction if a defendant presents *any* evidence in support thereof. O.R.C. 2923.12(C)(1) reads as follows:

> "(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordinance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:
>
> (1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed."

It is well settled that it is unnecessary for a trial court to give requested jury instructions where the proponent has failed to present sufficient evidence in support thereof. *State v. Bailey*, 100 S. Ct. 624, 444 U.S. 393 (1980). The trial court, in the pending action, denied the request for the instruction and held that the evidence did not "*** raise the facts necessary for a minimum showing of the defense." There was *no* evidence presented as to several elements of the defense and the instruction, therefore, was not mandated.

Petitioners' third argument raises no federal question and there exists no special and important reason for granting a writ of certiorari.

In their fourth and final argument, the petitioners assert that there was insufficient evidence to convict both of them of carrying a concealed weapon. Viewing the evidence presented at trial in a light most favorable to the government, a rational trier of fact could have found both petitioners guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S 307, 99 S. Ct. 2781 (1979). The appellate court noted with particularity the evidence which supported each and every element of the offense charged. Petitioners make no effort to establish that a federal question was decided by the State appellate court nor do they present special and important reasons for granting a writ of certiorari.

CONCLUSION

There has been no important question of federal law decided by the State appellate court and no important and special reason exists for the granting of a writ of certiorari. The petition, therefore, should be denied.

Respectfully submitted,

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